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**IN THE
COURT OF APPEALS OF INDIANA**

MARCELLA WILEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 48A02-0606-CR-506
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0501-FC-53

February 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Marcella Wiley pled guilty to theft and forgery and was placed on probation. In April 2006, she was found to be in violation of her probation for committing additional crimes and for failing to pay the court-ordered restitution. Her probation was revoked and she was ordered to serve a four-year sentence. She now appeals the order revoking her probation, raising three issues for our review: 1) whether the trial court erred by admitting hearsay evidence; 2) whether there was sufficient evidence to support the finding Wiley violated her probation by failing to pay restitution; and 3) whether the trial court abused its discretion by sending Wiley to prison. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

In April 2004, Wiley broke into her mother's car and stole her mother's purse and its contents. She also attempted to cash a check on her mother's checking account but the bank twice refused to cash the check. Wiley was charged with theft, a Class D felony; forgery, a Class C felony; and receiving stolen property, a Class D felony. Wiley entered into a plea agreement and pled guilty to theft and forgery. She was sentenced to concurrent terms of eighteen months imprisonment on the theft conviction and four years imprisonment on the forgery conviction, with the entire sentence suspended. Additionally, she was placed on probation for four years. As one of the conditions of probation, the trial court ordered Wiley to make restitution to her victim within six months.

On September 21, 2005, a Notice of Probation Violation was filed against Wiley alleging that she failed to timely pay the court-ordered restitution. Wiley admitted to this

violation. The trial court found she had violated her probation, but continued the probation under the same terms and conditions.

On April 19, 2006, another Notice of Probation Violation was filed against Wiley. This Notice alleged she had violated her probation by failing to pay the court-ordered restitution and by committing additional crimes. Wiley denied the allegations. A revocation hearing was held on May 8, 2006.

At the revocation hearing, Wiley's probation officer testified that Wiley had not paid any of the court-ordered restitution. The State also presented testimony of Madison County Deputy Sheriffs Douglas Belz and Paul Kollros. Their testimony reflected that police were dispatched to investigate a domestic disturbance between Wiley and her mother. The police determined there was an active warrant for probation violation in Henry County against Wiley. The police then arrested Wiley. Upon her arrest, items were confiscated from Wiley, including an iPod and over \$300.00. These items were subsequently found to be items taken in incidents where car windows had been broken and purses stolen from the cars. Wiley's mother later turned over to the police several purses she found inside Wiley's car. These purses were found to be the purses stolen from the other cars. When questioned in the matter, Wiley admitted to breaking into one of the vehicles where an iPod was stolen. Wiley was then charged in those cases.

Wiley also testified at the revocation hearing and denied any memory of committing the thefts or of admitting to the police that she had done so, claiming her medications affected her memory. She testified she needed help with her mental health issues, had five

chronic illnesses, three mental disorders, and was in therapy at the Center for Mental Health. She requested the court to place her in drug court.

The trial court found Wiley had violated her probation by committing five new counts of theft and by failing to pay restitution. The trial court revoked her probation and ordered her four-year sentence to be served at the Department of Correction.

Wiley now appeals the May 8, 2006, Order on Violation of Probation. Wiley argues that the trial court abused its discretion by admitting hearsay evidence, by finding she violated her probation by failing to pay restitution, and by revoking her probation.

Discussion and Decision

I. Standard of Review

A probation revocation hearing is civil in nature, and the State need prove the alleged violations only by a preponderance of the evidence. Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999). We will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. Id. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. Id. A trial court's decision to revoke probation and its subsequent sentencing decision are reviewed for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005).

II. Hearsay Evidence

Wiley argues that her probation revocation must be overturned because the trial court improperly admitted into evidence hearsay testimony elicited from Police Officer Belz. We note Wiley failed to object to the testimony at the revocation hearing. “Generally, the failure to object, and thereby properly preserve an issue for appeal, results in waiver.” Marsh v. State, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004). Therefore, the issue is waived.

To avoid waiver, Wiley also argues admission of the testimony constitutes fundamental error depriving her of a fair trial. However, she fails to explain how the testimony given constitutes fundamental error. She only states the definition of “fundamental error” without any argument concerning the specific evidence and how that evidence falls within the parameters of the fundamental error exception to the contemporaneous objection rule. Thus, her fundamental error claim fails for lack of cogent argument. Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006).

Wiley further complains the State failed to justify admission of the hearsay evidence by failing to prove the witnesses were unavailable and to show any “indicia of reliability.” However, probation hearings are specifically exempt from the application of the rules of evidence. Ind. Evidence Rule 101(c)(2). Therefore, the evidence rules concerning hearsay are inapplicable in a probation revocation hearing. Marsh, 818 N.E.2d at 145. Additionally, in a probation revocation hearing, trial court judges may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay. Id. Of course, judges are not bound to admit all evidence presented to the court. And, in the absence of

strict evidentiary rules, judges carry a special responsibility in assessing the weight, sufficiency and reliability of proffered evidence. Cox, 706 N.E.2d at 551.

Here, Police Officer Belz testified as to his conversations with car theft victims who told him that their vehicles had been broken into and that their purses and other valuables were stolen from their vehicles. Belz further testified that items recovered from Wiley and the purses turned over to police by Wiley's mother, that she had found inside Wiley's car, were the purses and items reported stolen by the victims of the several cases that he was investigating. Belz also testified that when he questioned Wiley in the matter, she was advised of her Miranda warnings and signed a waiver of those rights and agreed to speak with him. Wiley subsequently admitted to breaking into the vehicle where the iPod was taken, and further indicated she had had continuous control over the vehicle in which the other purses were recovered. Belz testified that based on that information and the ability by the police to link the property back to the victims, Wiley was then charged with five counts of theft.

Thus, the evidence presented by Belz and considered by the court was that the stolen items were recovered from Wiley's person and her vehicle, and that Wiley admitted to the crime. Belz testified he was present when the statement was made and the statement was made by Wiley to police at a time when police were investigating her for the crime and she had been advised of her rights. Under these circumstances, we believe that Belz's testimony was sufficiently reliable to be admitted in the proceeding. Thus, we conclude the trial court did not abuse its discretion in admitting the testimony.

III. Failure To Pay Restitution

Wiley asserts the State failed to present sufficient evidence that she intentionally failed to pay her court-ordered restitution. However, Wiley's probation officer testified at the revocation hearing that Wiley had not paid any of the required restitution judgment. Wiley had read and signed her probation conditions, which included the condition that she pay the restitution. Wiley was present in court when the trial court ordered her to pay restitution within six months. Further, in her first probation violation, Wiley admitted to violating the restitution provision of the probation conditions. Wiley clearly knew she was to pay the restitution and did not do so. She provided no financial explanation for not paying the restitution. The evidence demonstrated that she knowingly failed to pay her court-ordered restitution.

Moreover, the trial court found she violated the conditions of her probation not only because of her failure to pay restitution but also because she committed several new offenses while on probation. Probation may be revoked upon the finding of the violation of a single condition of probation. Rosa, 832 N.E.2d at 1121. There was sufficient evidence to support the trial court's finding that Wiley violated the conditions of her probation.

IV. Sentencing

Wiley contends the trial court abused its discretion by revoking her probation. "Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment." Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). These restrictions are designed to ensure that probation serves as

a period of genuine rehabilitation and the public is not harmed by a probationer living within the community. Id. Upon a probation violation, the trial court is required to look to the terms of the probation revocation statute for the potential consequences to be imposed for the violation of probation. Id. Three sanctions are available to the trial court for probation violations: 1) continue the person on probation with no modifications to the probationary conditions; 2) extend the probationary period; or 3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. Ind. Code § 35-38-2-3-(g). Ultimately it is up to the trial court's discretion as to what sanction to impose under this statute. Abernathy, 852 N.E.2d at 1022.

Wiley violated her probation by failing to pay the required restitution and by breaking into the cars of several people and stealing purses and other valuables and she is now facing prosecution for those offenses. Moreover, Wiley was previously found to have violated her probation by failing to pay the required restitution and was shown leniency by the trial court and yet this did not reform her behavior. The facts, as set forth above, demonstrate the trial court had ample basis for its decision to order Wiley to serve the suspended portion of her sentence. The trial court, therefore, did not abuse its discretion when it ordered Wiley to serve her four-year sentence.

Conclusion

Based on the foregoing, we conclude the trial court did not abuse its discretion by admitting the police testimony, by considering evidence sufficient to show Wiley violated the conditions of her probation, or by revoking Wiley's probation and sentencing her to serve her

sentence in the Department of Correction. Wiley has failed to show the trial court abused its discretion.

Affirmed.

BAKER, J., and DARDEN, J., concur.